IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1364

JOSEPH BUGLIARELLI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BARRY IVAN SLOTNICK
Counsel for Petitioner
15 Park Row
New York, N.Y. 10038
(212) WO 4-3200

JACOB KOSSMAN
Of Counsel

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

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MISCELLANEOUS

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-v.-

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case, entered on January 19, 1976.

OPINION BELOW

The decision of the Court of Appeals below was rendered without opinion by a panel consisting of Judges Lumbard, Smith and Mansfield. The judgment of the Court of Appeals is appended hereto. (Appendix A, *infra*, 1a).

JURISDICTION

The judgment of the Court of Appeals below was entered on January 19, 1976. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 26, 1976. (Appendix B, infra, 2a-3a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether failure of Special Agents from the Intelligence Division of the Internal Revenue Service to comply with the published instructions of the Service, directing them to advise a taxpayer of his rights to remain silent and to retain counsel, requires exclusion of an admission obtained from a taxpayer not advised of his rights.

2. Whether repetitive questioning of a taxpayer by Special Agents from the Intelligence Division of the Internal Revenue Service over a period of six months, after an initial meeting in which the taxpayer stated that he would not discuss cash on hand at the beginning of the tax period in controversy, in order to elicit from the taxpayer an admission of cash on hand, without advising taxpayer of his rights as directed by published regulations of the Internal Revenue Service, requires exclusion of the taxpayer's admission.

3. Where Special Agents from the Intelligence Division of the Internal Revenue Service on June 18, 1973 obtained from a taxpayer under criminal investigation a statement that the taxpayer did not keep any money in his house or any place else except in bank accounts, and where this statement was subsequently introduced into evidence to attempt to prove the taxpayer's net worth on January 1, 1970, and where the Special Agents conducting the interview failed to advise taxpayer of his rights to remain silent and to have counsel as required by published directives of the Internal Revenue Service, can the conviction of the taxpayer through the net worth method be upheld?

4. Whether the trial court committed reversible error in permitting the prosecution, in a net worth criminal tax fraud case, to introduce inflammatory evidence connecting the taxpayer with gambling activity and corruption of a state police officer at a time *after* the period covered by the income tax indictment.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

I. Federal Statute: 26 U.S.C. § 7201:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

II. Administrative Provisions

A. IRS Release No. 897, October 3, 1967, 7 CCH 1967 Stand. Fed. Tax Rep. ¶ 6832:

> "In response to a number of inquiries the Internal Revenue Service today described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.

Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.

Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.

On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: As a special agent, I have the function of investigating the possibility of criminal tax fraud.

If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

If it becomes necessary to take a person into custody, Special Agents must give a comprehensive statement of rights before any interrogation. This statement warns a person in custody that he may remain silent and that anything he says may be used against him. He is also told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner.

IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons."

B. IRS Release No. 949, November 26, 1968, 7 CCH 1968 Stand. Fed. Tax Rep. ¶ 6946:

"Changes in the procedure for advising taxpayers of their rights during an investigation conducted by a Special Agent of the IRS Intelligence Division were announced today by the Internal Revenue Service.

The new procedure goes beyond most legal requirements that are designed to advise persons of their rights.

One function of a Special Agent is to investigate possible criminal violations of Internal Revenue laws. At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding.

Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advise unless the taxpayer was in custody or the investigation proceeded beyond the preliminary stage.

IRS has made no change in its existing instructions that if it becomes necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before any interrogation. This statement warns the person in custody that he may remain silent and that anything he says may be used against him.

A person in custody also must be told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner."

STATEMENT OF THE CASE

This is a criminal prosecution for personal income tax evasion under 26 U.S.C. § 7201. Petitioner, Joseph Bugliarelli, was charged in two counts with violating § 7201 for calendar years 1970 and 1971. Trial by jury was held in the United States District Court for the Southern District of New York (Weinfeld, J.). Upon verdicts of guilty on both counts, the District court imposed sentence of two years imprisonment on each count, with the sentences to run concurrently. On appeal to the United States Court of Appeals for the Second Circuit (Lumbard, Smith, and Mansfield, C. JJ.), the judgment of the District Court was affirmed without opinion. (Appendix A, infra, 1a).

The prosecution proceeded under a variant of the net worth method of proof of income tax evasion sometimes described as the "cash expenditure method." Following this theory, the prosecution produced evidence tending to show expenditures by petitioner in 1970 and in 1971 greater than the income reported by him in the joint returns filed for those years by petitioner and his wife. The prosecution's evidence of petitioner's expenditures during the two years was not contested by the defense; much of the evidence was by stipulation. The Government showed expenditures during the two years of some $49,000. The current taxable income reported by petitioner in that period was $9,000.

Evidence of expenditures in any year does not, of course, prove that the party making them had current taxable income for that period. The prosecution therefore undertook to prove that the expenditures were not made from funds accumulated before 1970. The Government also undertook to try to prove that petitioner had a likely source of taxable income during 1970 and 1971 to account

for the expenditures made in those years. These two facets of the Government's case present most serious problems for sustaining this conviction.

A. *Attempted Proof of Petitioner's Net Worth on January 1, 1970.*

The principal evidence adduced by the Government to negate the possibility that funds received prior to the indictment years had been the source of the admitted expenditures duri g the indictment years was an alleged admission by petitioner to a Special Agent of the Internal Revenue Service. Special Agent Robert Mongelli testified that he, together with Special Agent Morton Dick, interviewed petitioner on June 18, 1973. (Tr. 228-229). This interview was nearly three and one-half years after the starting date for the prosecution, January 1, 1970. Special Agent Mongelli testified:

> "Q. Did your discussion turn to where he kept his money?
>
> "A. Yes, it did.
>
> "Q. Tell us what was said in that connection.
>
> "A. Mr. Bugliarelli stated that he didn't keep any money in his house or any place else, but he did keep his money in his bank accounts." (Tr. 231-232).

Nothing in this brief exchange referred to a time other than the time it occurred, i.e., June 1973. Nor did anything in the context of this interview give any basis for relating petitioner's statement back to January 1, 1970. Nevertheless, it is this statement that is relied upon by the Government to establish that the starting net worth for petitioner included no cash on hand on January 1, 1970. (E.g., U.S. Brief in the court below, p. 6).

Not only is the alleged admission of petitioner

substantively insufficient, but the procedure whereby an admission was sought is also defective. Special Agent Mongelli testified that neither he nor Special Agent Dick advised petitioner on June 18, 1973 of his constitutional rights and privileges, of his right to remain silent, of his right to have counsel, and of the fact that anything he said could be used against him in a criminal proceeding. (Tr. 236). The failure of the Special Agents to give these warnings was a direct violation of the instructions of the Internal Revenue Service. Two published releases by the IRS, issued October 3, 1967 and November 26, 1968, announced the procedures of the Service for protecting the Constitutional rights of persons suspected of criminal tax fraud during all phases of its investigations.

The October 1967 release provided that IRS Special Agents must state to a taxpayer on initial contact that they have the function of investigating the possibility of criminal tax fraud. These instructions contemplated that the criminal aspects of a case might be eliminated by these preliminary inquiries. The published instructions continued: "If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel." IRS Release No. 897, 7 CCH 1967 Standard Fed. Tax Rptr. ¶ 6832, Oct. 3, 1967. The release concluded with additional requirements if the taxpayer is taken into custody.*

The Internal Revenue Service amended its instructions the following year. The November 1968 release announced "changes in the procedure for advising taxpayers of their

*The full text of the release appears on pp. 3-4, *supra*.

rights during an investigation conducted by a Special Agent of the IRS Intelligence Division." The only change concerned the "initial meeting with a taxpayer." Whereas the 1967 instructions required only a statement that the investigator was looking into possible criminal tax fraud, the 1968 release declared that a Special Agent was henceforth required to add to this statement advice to the taxpayer that anything he said may be used against him, that he cannot be compelled to incriminate himself, and that he has the right to assistance of counsel before responding. Nothing in the 1968 release altered the procedural requirements when the initial interview did not conclude the criminal investigation and "further investigation becomes necessary." The 1968 release explicitly restated the requirements where a Special Agent conducts an interview of a taxpayer in custody. IRS Release No. 949, 7 CCH Standard Fed. Tax Rptr. ¶ 6946, Nov. 26, 1968.*

The interview of petitioner conducted by Special Agents Mongelli and Dick was not the "initial meeting." A series of prior interviews had already occurred. Only at the initial meeting was petitioner advised in accordance with the IRS requirements. (Tr. 326-328). This had occurred on December 6, 1972. The advice was given by Special Agent Mooradian, who was not present or involved in the interview of June 18, 1973. In the December 6, 1972 interview, where petitioner had been advised of his rights, "he refused to answer when asked about cash kept at home." (Tr. 346).

There were five subsequent interviews of petitioner by IRS Special Agents. They took place on December 11, 1972; January 17, 1973; February 14, 1973; March 15,

*The full text of the release appears on p. 5, *supra*.

1973; and finally on June 18, 1973. Four of these were the basis for evidence adduced at the trial. (Tr. 208-228, 228-229, 247, 344-347). During this extensive "further investigation," the Special Agents involved did not at any time advise petitioner of his legal rights. Ultimately, in the June 18, 1973 interview, they obtained what the Government believed is an incriminating admission of cash on hand, an answer earlier refused when petitioner had been advised of his right not to answer.

Petitioner moved to strike the testimony of Special Agent Mongelli on the ground that the June 18, 1973 interview had been conducted in violation of the published requirements of the Internal Revenue Service. (Tr. 237). The District Court held that "no matter what the policy of the Internal Revenue Service may be, this does not establish a constitutional right which otherwise did not exist. . . . Under the circumstances here presented I hold that there was no requirement to advise the defendant of his constitutional rights." (Tr. 244-245).

The District Court also indicated that defense counsel had not filed a pretrial motion to suppress Special Agent Mongelli's testimony and did not object when he gave direct testimony. (Tr. 243-244). The Government contended in the court below that defense counsel should have known that the Special Agents violated the published instructions of the IRS because counsel had been provided copies of the interview report for June 18, 1973, and it contained no reference to the Special Agents advising petitioner of his rights; the omission was said to constitute "notice as to the lack of any warnings at the June 1973 interview." U.S. Brief in thecourt below, p. 13 note*. Petitioner properly contended that his motion to strike was timely after the first opportunity to cross examine Special Agent Monelli (Tr. 241). In any event the district court ruled on the substance of the defense motion.

B. *Attempted Proof of a Likely Source of Petitioner's Income.*

The Government's case was critically dependent on its need to show that petitioner's expenditures in 1970 and 1971 were not based on funds accumulated prior to January 1, 1970. The defects in its proof of the starting net worth have been set forth. The Government also undertook to try to prove that petitioner had a likely source of income during the indictment years, 1970 and 1971. In attempting this line of proof, the prosecution produced evidence, admitted by the district court, that was intensely prejudicial to the defendant. The evidence tended to show that petitioner was engaged in illegal gambling activities *after* the indictment years.

We will turn to the extremely prejudicial nature of this evidence adduced to show petitioner's involvement with a gambling enterprise, but first it is necessary to assess the theory that income from illegal gambling was a likely source of petitioner's income for the indictment years.

The Government produced no direct evidence that petitioner was involved with gambling activities in 1970 or 1971. *A fortiori*, the Government produced no evidence to indicate that petitioner had income from gambling sources sufficient to provide the funds needed to make any or all of the expenditures admitted to having been made. The Government's evidence was limited to an attempt to show that petitioner was connected with a gambling enterprise *in 1972*, the year following the indictment years. In the Court of Appeals, the Government added further assertions, not based upon the evidence in the record, tending to show that petitioner may have been connected with illegal gambling *prior* to the indictment years as well. The Government informed the Court of Appeals of petitioner's record of arrests and convictions. "Had defendant's 'rap' sheet been shown to the jury, it would have shown two felony con-

victions in the 1950s . . . approximately ten gambling arrests between 1962 and 1969, and the February 1972 arrest." (U.S. Brief in the court below, p. 31 note.).

The Government has yet to face the implications of its assertions that petitioner had ten gambling arrests between 1962 and 1969 on the prosecution of this Federal case. It was essential for the conviction of petitioner for income tax evasion in 1970 and 1971 to negative substantial cash on hand at the start of those years. The United States brief produces petitioner's record of possible violations of State gambling laws for eight years preceding the indictment years. Obviously gambling requires substantial cash on hand. Indeed, on the Government's theory as to his occupation, there is an inherent probability that he had substantial currency on hand on January 1, 1970. The major premise of this income tax prosecution is fatally undermined by the Government's own theory as to the likely source of petitioner's income.

In attempting to show that petitioner was engaged in gambling in 1972, the Government adduced inflammatory and prejudicial evidence, only marginally relevant to the Federal income tax prosecution, that implicated petitioner in violation of New York gambling law and in further violation of New York law prohibiting bribery and corruption of police officials.

That evidence showed that the New York City Police were raiding an illegal numbers operation on February 11, 1972, when petitioner entered the premises. (Tr. 424). A New York City police officer testified that petitioner identified himself as a "main cousin," (which the officer said meant someone who makes substantial illegal payoffs to policemen — who had previously paid $125 per month for protection. (Tr. 428-429). The officer added that petitioner offered him a bribe of $200 to drop the arrest

proceedings then underway. (Tr. 428). The spectacle of these collateral violations of State law, evidenced by the testimony of the arresting officers, was underscored by the playing of a wire recording made by an electronic device secreted on the body of one of the New York City policemen. (Tr. 443).

Despite lack of evidence addressed to the indictment years, the jury was allowed to speculate from the 1972 incident that petitioner derived substantial income from illegal gambling activities in 1970 and 1971. Any inference back that might properly be drawn is tenuous at best; the value of this evidence, however, is overcome by the intense prejudice to the defendant from the introduction of such collateral State offenses.

The course of the jury's deliberations indicates that they had some difficulty determining to return verdicts of guilty. Even though the evidence as to expenditures during the indictment years was essentially uncontested, the jury deliberated for an unusual length of time. The case was submitted to them at 12:20 p.m. on September 24, 1975. (Tr. 804). The verdicts were not returned for nearly fourteen hours. The District Court heard the jury's decision at 2:00 a.m. on September 25. This occurred only after the trial judge instructed the jury at 12:45 a.m., after twelve hours of deliberation, that any dissenting jurors should consider whether their doubts were reasonable ones if those doubts had made no impression on the minds of the majority of jurors, who were equally honest and intelligent. (Tr. 812).

REASONS FOR GRANTING THE WRIT

First, it is now timely and appropriate, indeed necessary, for this Court to scrutinize the routine prosecution of

criminal tax cases without regard to the safeguards stressed by this Court in its last detailed examination of the net worth method of proof. Twenty-two years ago, in a series of four cases, this Court set standards for the lower federal courts to follow in the trial of net worth prosecutions. The lead opinion was in *Holland v. United States*, 348 U.S. 121 (1954). There, the Court concluded that this method of proof "is so fraught with danger for the innocent that the courts must closely scrutinize its use." Id. at 125. The Court proceeded to give that case and the others then before the Court the most searching examination. *Friedberg v. United States*, 348 U.S. 142 (1954); *Smith v. United States*, 348 U.S. 147 (1954); *United States v. Caldron*, 348 U.S. 160 (1954).

This Court, in *Holland*, canvassed six "dangers" or "pitfalls inherent in the net worth method." Id. at 127, 129. All of them have significance for petitioner's case. The first is the most basic. The Court declared that it is an "essential condition" to establish with reasonable certainty the opening net worth to serve as a starting point for the calculations to follow. The fundamental importance of this "essential condition" was underscored by the Court's extensive treatment of it in all four cases. The Court made a most detailed and searching examination of the records *to satisfy itself* that the prosecution evidence was sufficient.

Four of the "dangers" or "pitfalls" relate primarily to the prosecution case as built upon the foundation of the starting net worth. The Court noted that there is a serious risk of juries being overly impressed with numerical data, which may be misleading by its apparent precision. A jury might be led improperly to infer the element of taxpayer willfulness from the increase in net worth alone. Defendants risk prejudice in the minds of jurors through the tendency to shift the burden of proof to the taxpayer

who is required to come forward with explanatory evidence; however, presentation of such evidence, noted the Court, risks losing the jury. Juries will have difficulty relating net worth evidence to a particular tax year with the result that the taxpayer may be convicted of counts of which he is innocent.

The sixth point made by the Court concerned the dangers inherent in prosecution use of statements made by taxpayers to IRS agents during an investigation. Taxpayers may be unaware of the real nature of the issues and the significance of their responses. Their statements may be motivated by efforts to obtain settlement of a civil nature. Accordingly, all such statements must be viewed with special concern. This Court said, it is crucial that there be corroborating evidence. The safeguard of corroboration was stressed in *Holland*, *Smith* and *Calderon*.

In the twenty-two years since the 1954 decisions, this Court has declined to review criminal tax prosecutions brought on the net worth method. Administration of the safeguards crafted by this Court has been left in the hands of the district Courts and the Courts of Appeals. A substantial body of law has developed that is out of keeping with this Court's views. The lower federal courts have failed to follow the lead of this Court in exercising close judicial scrutiny of the tax prosecutions. Students of this body of case law have concluded that the safeguards have become phantoms as a result of failure of judicial oversight of jury verdicts. See Maxwell, Employing the Cash Hoard Defense Against a Net Worth Fraud Determination, Journal of Taxation 86. (Feb. 1976); Duke, Prosecutions of Attempts to Evade Taxes, 76 Yale L.J. 1 (1966).

The abnegation of judicial responsibility to scrutinize net worth prosecutions is fully exemplified by this case. The

"essential condition" of a reliable starting point was not established. There is not in this case the painstaking review of the taxpayer's financial affairs prior to the indictment years that laid the foundation for the 1954 decisions. The conviction rests on an alleged admission by petitioner, three and one-half years after the starting point, that he did not have a substantial amount of cash on hand. There is no assurance that the statement made in June 1973 relates back to January 1970. Even if some weak inference of relation back is permitted, the foundation is not on the basis that this Court decreed in *Holland*, *Friedberg*, *Smith*, and *Calderon*.* The bold assumption that "X" equals "O" cannot withstand analysis.

The foundation, weak as it is, was derived entirely from a pretrial statement of the taxpayer to IRS agents. The trial of this case gave no attention to this Court's cautions regarding such statements. The Government contends that petitioner is a gambler and has been such since 1962. The Government totally failed to meet the significance of that contention insofar as it affects the starting net worth of the taxpayer in 1970.

The case further exemplifies other pitfalls that this Court described. Despite defense concession of the facts on expenditures, the Government introduced a mass of numerical data to esablish them with precision. The misleading precision of this data clouds the utter lack of any accurate evidence of unreported income for either tax year in question. The Government tried by indirection to

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* This case fits Professor Duke's description of courts' handling of proof of starting net worth: "it seems plain that the 'requirement' that the beginning net worth be 'established with reasonable certainty' is little more than a boilerplate jury instruction. As a separable safeguard and component of the Government's burden of establishing a *prima facie* case, it is, in many courts, a fiction." Duke, Prosecutions for Attempts to Evade Taxes, 76 Yale L.U. 1, 25 (1966).

establish that petitioner was in a gambling enterprise during the indictment years. No doubt the lack of any accurate information as to his income in those years is predicated on the aphorism of the Second Circuit that gambling is "an occupation with indeterminate possibilities." *United States v. Costello*, 221 F. 2d 668, 672 (2d Cir. 1955), affirmed on other grounds, 350 U.S. 359 (1956). Conviction of a defendant for criminal tax fraud on the basis of "indeterminate possibilities" is an indication of how far the lower federal courts have strayed from this Court's 1954 principles.

This overview of the case is not intended to be a brief on the merits. Such is not permitted under this Court's Rule 19. Without elaborate argument, it is plain that this case fully presents for review the basic issues of net worth prosecutions. The urgent need for this Court to give such prosecutions further detailed examination is manifest. While the lower federal courts fail to implement the standards that this Court announced, the net worth method of proof will continue to do the grave injury that this Court clearly foresaw in 1954.

Second, the time is ripe for this Court to consider the significant change in net worth criminal tax prosecutions found in the procedural standards adopted by the Internal Revenue Service. These standards were first announced by the IRS in 1967. A revision was published the following year. The Internal Revenue Service thereby undertook to regulate the actions of its Special Agents when conducting investigations of criminal tax fraud. The significance of this regulation has now been litigated in a series of cases across the country. With the exception of the Second Circuit, the Courts of Appeals have concluded that evidence obtained by Special Agents in violation of the IRS

rules must be excluded in a criminal prosecution of taxpayers. The Second Circuit's position, reflected in this case and prior opinions, is in conflict with the judgments of the First, Fourth, and Ninth Circuits. The issues posed by the IRS regulations are of the greatest importance to net worth prosecutions. The conflict among the Circuit Courts is added reason for prompt review by this Court.

When the Internal Revenue Service first announced regulations for criminal tax inquiries in October 1967, the Service indicated the reason for its action: "In response to a number of inquiries the Internal Revenue Service today described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigation." IRS Release No. 897, 7 CCH 1967 Standard Fed. Tax Rptr. ¶ 6832 (Oct. 3, 1967).

The release noted that criminal investigations are conducted by Special Agents of the Intelligence Division, a function separate from the work of other agents who deal with civil liability. The release instructed Special Agents to assure that taxpayers whom they interviewed are aware, first, that a criminal investigation is under way. The Service wished to bring to an end the heavily criticized practice of conducting criminal investigations without the taxpayers being aware of the serious nature of the inquiries.

The 1967 release went further and instructed Special Agents to advise taxpayers of their Constitutional rights. The IRS explicitly recognized that its instructions "go beyond most legal requirements to assure that persons are advised of their Constitutional rights." Accordingly, Special Agents were ordered to take differing actions at three levels of inquiry: One set of instructions concerned the initial contact between a taxpayer and Special Agent. A

second set of instructions dealt with further investigations with the same taxpayer. A third directive considered the Special Agent's duties when a tax[illegible]had been taken into custody. The full text of the 1967 release appears at pages 3-4, *supra*.

In 1968, the Internal Revenue Service issued an amendment to the instructions contained in the original directive. The only change dealt with the initial meeting between a Special Agent and a taxpayer. The 1968 release ordered Special Agents to disclose not only that a criminal investigation was under way, but to include in their statements to persons interviewed advice as to Constitutional rights. Otherwise, the 1967 procedures were unchanged. IRS Release No. 949, 7 CCH Standard Fed. Tax Rptr. ¶ 6946. The full text of this release appears at page 5, *supra*.

The first Court of Appeals to face the issue of non-compliance by a Special Agent with the IRS directives was the Fourth Circuit. The facts involved an interview in November 1967, one month after the first instructions had been published. Indeed, the meeting in November was only for the purpose of having the taxpayer sign a statement based upon an interview several months earlier. The Court of Appeals for the Fourth Circuit ordered the taxpayer's conviction reversed because the written statement had been used in the trial of the case. The court said that an agency of the Government must scrupulously observe rules, regulations or procedures that it has established. The court held that it was insignificant that the IRS procedures were more liberal than the Constitution required. To permit violations of the instructions without judicial redress would constitute arbitrariness. *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1970).

The Fourth Circuit decision was followed by the First Circuit later in 1970. *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970). Judge Coffin, writing for the court, stated that due process requires the IRS to follow its announced procedures. He gave two related reasons. First, the declared objective of the IRS regulations is to obtain uniform conduct by all Special Agents. Second, the agency having made public its instructions, there is no way of assuring that taxpayers and their counsel have not relied on the announcement. Since the IRS has a duty to conform to its own procedures and citizens have a right to rely on conformance, evidence obtained in violation of the rules must be excluded.

The Court of Appeals for the Ninth Circuit agreed that evidence obtained from individual taxpayers in violation of the IRS regulations should be excluded. That court indicated that a different result would follow with respect to corporate taxpayers. *United States v. Sourpas*, 515 F.2d 295 (9th Cir. 1975).

The Court of Appeals for the Second Circuit rejects the views of the First, Fourth and Ninth Circuits by its decision in this case. Although there is no opinion from the court below, two recent opinions from other panels in the Second Circuit contained dicta forecasting the departure. *United States v. Leonard*, 524 F.2d 1076, 1089 (2d Cir. 1975); *United States v. Gentile*, 525 F.2d 252, 259 (2d Cir. 1975). Both opinions, written by Judge Friendly, acknowledged the decisions of the other Circuit Courts, but distinguished the cases then before the Second Circuit so that "we are not obliged to determine whether we would follow the lead of other circuits which have held that violation of the News Releases mandates the exclusion of incriminating statements." 525 F.2d at 259. The present case cannot be distinguished from *Heffner, Leahey* and *Sourapas*. The

decision by this panel directly conflicts with the other Circuit Courts.

The conflict is highlighted by the decision of the district court in this case. Judge Weinfeld expressly rejected defendant's argument based on *Heffner* and *Leahey*. In the district court's opinion, the evidence was admissible unless constitutional standards required its exclusion. The existence of the IRS procedures did not affect the question of admissibility, as the distinguished trial judge ruled: "no matter what the policy of the Internal Revenue Service may be, this does not establish a constitutional rights which otherwise did not exist." (Tr. 244-245). Counsel for the United States, seeking affirmance in the court below, argued (as they must to sustain the trial court's judgment) that evidence obtained in violation of the IRS regulations is not for that reason excludable. (U.S. Brief in the court below, pp. 16-18.)*

The decisions of the Court of Appeals and the district court in this case thus collide with contrary judgment of every other Circuit Court that has determined the issue. This is plainly a conflict upon an important question of federal law. The mandatory instructions issued to Special Agents by the Internal Revenue Service were designed to remedy a serious flaw in the procedure for investigating criminal tax cases. There was and is the strongest need for uniformity in the application of the tax laws of the United

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* The Tenth Circuit has also discussed the effect of the IRS procedural requirements on the admission of evidence obtained by Special Agents. That Circuit Court, finding the record before it unclear as to the extent of compliance with the regulations, withheld ruling on whether the IRS rules confer any procedural rights on taxpayers. *United States v. Bettenhausen*, 499 F.2d 1223 (10th Cir. 1974). The case demonstrates the IRS practice in that region of giving a suspect notice of his rights at *every* interview, contrary to the facts in the present case.

States. The existing conflict should be promptly considered by this Court and resolved.*

Third, this case presents a new dimension to net worth prosecutions in the extraordinary use of highly prejudicial evidence. In its effort to show a likely source of income for petitioner in 1970 and 1971, the Government introduced inflammatory evidence of petitioner's involvement in violations of State law. Police testimony was produced tending to show the federal jury that petitioner was engaged in gambling, violating New York State law, in 1972. Worse, the Government produced evidence that petitioner attempted to commit bribery in connection with

* The effort by the Government to contend that there was no violation of the IRS procedures in this case, to the extent that this contention has any validity, also raises an important question of federal law. In the court below, the Government argued that IRS Release No. 949, issued in November 1968, did not merely amend IRS Release No. 897, issued the prior year. Rather, the Government took the position that the 1968 action *superseded* the instructions issued in 1967. Such a reading is utterly inconsistent with the plain text of the 1968 regulation. Moreover, the Government's position puts the absurd view that a taxpayer subjected to a series of interviews, or "further investigation" as it was described in the 1967 regulation, has less protection as a result of the 1968 order. The Government has given not the slightest suggestion of evidence to support the argument that the IRS intended to reduce the protection of taxpayers when it amended the 1967 directive. The text itself indicates that the purpose was to enlarge the citizen's protection. In the only case to come before a court involving "further investigation" interviews, the Special Agents attempted to advise the taxpayer of his rights at every interview. See United States v. Bet[illegible]hausen, 499 F.2d 1233 (10th Cir. 1974).

Likewise the Government's highpitched assertion that defendant waived the issue by failing to make timely protest is baseless. The Government relies upon amendments to the Federal Rules of Criminal Procedure that did not take effect until the trial in this case had been concluded. New F. R. Crim. P. 12 (b)(3) was not cited in the District Court, nor was the effect of new F. R. Crim. P. 12(f) considered. As soon as defense counsel elicited from Special Agent Mongelli, on cross examination, that he had not complied with the IRS instructions when he interviewed petitioner on June 18, 1973, counsel moved to strike the Special Agent's testimony. (Tr. 237). While the District Court criticized the procedure, the court did not find a waiver and ruled upon the motion on the merits. (Tr. 244-245).

the New York arrest. A wire recording of the dramatic arrest scene was played for the federal jury. This emotionally charged evidence dominated petitioner's trial for income tax evasion. Given this Court's cautions on the difficulty of keeping net worth criminal prosecutions within bounds of fairness, the extreme measures allowed in this case to injure and defame the defendant in the minds of the juror require further review by this Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ of certiorari should be issued to review the decisions of the United States Court of Appeals in this case.

Respectfully submitted,

BARRY IVAN SLOTNICK
Counsel for Petitioner

JACOB KOSSMAN
of Counsel

APPENDICES

APPENDIX A
JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of January, one thousand nine hundred and seventy-six.

Present:

HON. J. EDWARD LUMBARD
HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD
Circuit Judges,

United States of America,

Plaintiff-Appellee

v.

Joseph Bugliarelli,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by
Chief Deputy Clerk

APPENDIX B

PETITION FOR REHEARING

Present:
HON. J. EDWARD LUMBARD
HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD
Circuit Judges.

At a State Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of February, one thousand nine hundred and seventy-six.

(SAME TITLE)

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX B

PETITION FOR REHEARING EN BANC

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of February, one thousand nine hundred and seventy-six.

(SAME TITLE)

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/Irving R. Kaufman
Irving R. Kaufman
Chief Judge

No. 75-1364

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH BUGLIARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
ROBERT E. LINDSAY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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JOSEPH BUGLIARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court and the court of appeals did not render any opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1976 (Pet. App. A 1a-2a). A timely petition for rehearing with suggestion for rehearing *en banc* was denied on February 26, 1976 (Pet. App. B 3a-4a). The petition for a writ of certiorari was filed on March 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government established a reliable figure for opening net worth in its tax evasion prosecution of petitioner.

2. Whether statements made by petitioner to special agents of the Internal Revenue Service during noncustodial interviews were properly admitted in evidence when the agents warned him of his constitutional rights only prior to the initial interview and not at the subsequent ones.

3. Whether evidence concerning petitioner's attempt to bribe a police officer at a time subsequent to the prosecution years was properly admitted into evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of willfully attempting to evade taxes for the years 1970 and 1971, in violation of 26 U.S.C. 7201. The district court sentenced him to concurrent two-year prison terms on each count. The court of appeals affirmed without opinion (Pet. App. A 1a-2a).

The government used the "cash expenditures" method of proof to establish that petitioner had taxable income in amounts greater than that reported on his tax returns for the years in question. Petitioner's tax returns for 1970 and 1971 showed an aggregate of $9,000 in taxable income, allegedly derived from his activities as a salesman in 1970 and as the proprietor of a luncheonette from May—December, 1971, and a resulting tax liability of $1,500. The evidence, on the other hand, established that petitioner had a taxable income during those years of approximately $49,000, on which he owed $12,000 in income taxes. This was based on proof that during 1970 and 1971 petitioner incurred at least $49,000 of nondeductible expenditures, most of which were in cash (see, *e.g.*, Tr. 14-19, 25-35, 43-48, 51-57, 89-91, 103-121, 529).[1] During the investigation, petitioner

[1]"Tr." refers to the trial transcript.

stated to the special agents that he kept all of his money in the bank, that he had no cash on hand, and that he did not receive any gifts (Tr. 231-232, 229-230, 343-347).

The evidence also showed that respectively for 1970 and 1971, approximately $4,000 (more than $3,000 of which was in cash) and $6,700 (of which $5,300 was in cash) was deposited in a checking account in petitioner's wife's name (Tr. 186). Moreover, the bank records indicated that petitioner's wife, who was not employed during either 1970 or 1971 (Tr. 142), made weekly cash deposits of $150 to $200 during January—May 1971, a period when petitioner claimed to be unemployed (Govt. Exs. 31-31F).

Finally, the government also presented evidence that on February 11, 1972, petitioner was arrested when he paid $200 to a state police officer to drop the gambling arrest of Vincent Tarallo. In making this payment, petitioner told the officer that he was a "main cousin" —*i.e.*, someone well-known who makes a substantial share of illegal payoffs—and that he was there "to get this thing straightened out now" (Tr. 427-428; App. 15-16, 180).[2] When the police officer asked petitioner what he had previously been paying for protection, petitioner responded that he had been paying $125 per month (Tr. 428-429; App. 16-17, 181-182). With respect to this evidence the court cautioned the jury, both before (Tr. 420-422; App. 8-10) and after this testimony (Tr. 429; App. 17), as well as in its instructions (Tr. 786-787) that (Tr. 429; App. 17):

> We are not concerned in this case with any charge of alleged bribery which violates Federal or State law. The only purpose this is being received

[2]"App." refers to the record appendix in the court of appeals.

> for is to show that the government contends that the defendant had an interest in gambling activities. The government is going to urge upon you that this activity, if you believe it—and it is up to you whether or not you credit his testimony—reflects an interest in gambling activities as a source of income. We are not concerned with any aspect of the alleged bribery as such.

In defense, petitioner called his sister-in-law as a witness. She testified that in February 1969, just prior to her husband's (petitioner's brother's) death in April 1969, her husband gave $53,000 in cash to petitioner, asking petitioner to take care of his wife and children if anything should happen to him (Tr. 581-587). She stated that although petitioner took the money, he never gave her more than approximately $3,100 in return (Tr. 588-591).

In rebuttal to this testimony, the government introduced evidence that petitioner's sister-in-law and her husband had filed an affidavit in 1967 in a local court stating that they were unable to pay counsel fees in a civil trial (Tr. 624-626, 629). That civil case was subsequently settled upon their agreement to pay $400, with a $100 down payment and the remainder at the rate of $10 per week (Tr. 632-633). However, In March 1968, they defaulted on the payments and a judgment was obtained against them of approximately $600 to $700 in addition to what they had previously paid (Tr. 691-692). The judgment was finally collected in May 1970, when petitioner's sister-in-law sold her home (Tr. 692-693). There was also evidence that at the time of petitioner's brother's death in April 1969, the brother owed $816 to a hospital, no part of which was ever paid (Tr. 681).

ARGUMENT

1. As petitioner acknowledges (Pet. 14), the net worth method of proving criminal tax evasion has long been approved by the decisions of this Court. See, *e.g., Holland* v. *United States,* 348 U.S. 121. Under this method, the government is permitted to introduce evidence of the defendant's yearly increases in net worth which, with appropriate adjustments, is proof of the correct measure of taxable income. Although petitioner claims (Pet. 16) that there was an "utter lack of any accurate evidence of unreported income for either tax year in question," this is nothing more than a general complaint against the net worth method, the validity of which he concedes.

Here, the government used the "cash expenditures" variation of the net worth method and petitioner does not argue that its use in this case was inappropriate. He argues (Pet. 16-17) that the net worth computation was erroneous because the government did not establish a reliable figure for cash on hand at the beginning of 1970. In so arguing, petitioner alleges that there was no corroboration of his 1973 admission that he kept all of his money in the bank, that he had no cash on hand, and that he did not receive any gifts.

However, the evidence showed that agents of the Internal Revenue Service had canvassed court records, banks and brokerage houses, and had examined federal gift tax returns. This investigation established that petitioner had not received any gifts or bequests which could have been sources for the expenditures (Tr. 205-207). Thus petitioner's statement that he had virtually no cash on hand was corroborated by those records.

Moreover, the correctness of petitioner's statement was confirmed by the evidence, which discredited the claim that the expenditures were made from a "cash hoard" of $53,000 that petitioner had received from his brother. From the evidence that petitioner's brother and sister-in-

law had stated in 1967 that they were financially unable to pay counsel fees, that they had defaulted on a $400 judgment in 1968, and that they owed a $816 hospital bill in 1969, which was never paid, the jury could properly infer that petitioner's brother had not amassed a $53,000 cash hoard and that his sister-in-law's testimony that her husband gave petitioner that amount of money was false. When coupled with the statement he made in 1973 that he had virtually no cash on hand, the jury was amply justified in concluding that the government's zero cash on hand figure for the beginning of 1970 was reliable. Cf. *United States* v. *Bianco,* C.A. 2, No. 75-1244, decided April 8, 1976, slip op. 3102-3105.

2. Petitioner also argues (Pet. 17-22) that his statements to the special agents after the initial interview as to cash on hand should have been suppressed since they warned him of his constitutional rights only prior to the initial interview and not at the subsequent ones.[3]

Contrary to petitioner's implicit assumption, the conduct of the special agents in the case was in complete conformity with the announced procedures of the Internal Revenue Service. On November 26, 1968, the Service announced (see I.R.S. News Release IR-949 (1968 C.C.H. Stand. Fed. Tax Rep., par. 6946)) that henceforth its special agents were required upon *initial* contact with the taxpayer to give certain warnings of rights, including the right to remain silent and the right to

[3]Petitioner did not object when the special agent testified with respect to these statements. Thus, the district court properly concluded that petitioner's motion to strike the testimony, made during cross-examination of the agent (Tr. 237), was untimely, because petitioner was well aware of the fact that he received no warnings after the first interview and possessed documentary confirmation of that fact (Tr. 243-244). *United States* v. *Blackwood,* 456 F.2d 526, 529 (C.A. 2), certiorari denied, 409 U.S. 863.

counsel. Under the previous procedure, special agents were only required to produce their credentials upon initial contact and advise the taxpayer that they were charged with investigating criminal tax fraud (see I.R.S. News Release 897 (1967 C.C.H. Stand. Fed. Tax Rep., par. 6832)). The earlier news release also noted that if the potential criminal aspects of the matter were not resolved by preliminary inquiries and further investigation became necessary, the special agents were required to advise taxpayers of their right to remain silent and to retain counsel.

Petitioner argues (Pet. 18-19) that the two news releases must be read together. In his view, the provision of the first news release requiring agents to advise taxpayers of their right to remain silent and to counsel if preliminary inquiries did not resolve the potential criminal aspects of the matter requires that the warnings be given prior to all interviews because the second news release is silent as to all contacts with the taxpayer after the initial contact. But the second news release announced that there had been a "change" in the procedure, *i.e.,* that the special agents would advise as to the right to remain silent and to counsel at the first contact rather than after the agent determined that preliminary inquiries had not resolved the potential criminal aspects of the case. The second announcement thus superseded the first procedure in all respects.

Indeed, the purpose of the second procedure was to insure that the taxpayer would receive the warning at the initial interview; not to require that the warning be given prior to all interviews. Since it is undisputed that the agents gave petitioner the warning prior to the first interview, this case does not present the question whether, contrary to petitioner's assertion (Pet. 20-21), statements made by a taxpayer to special agents at a non-

custodial interview when the agents have not followed the prescribed warning procedure at the initial interview are admissible. See *United States* v. *Heffner*, 420 F.2d 809 (C.A. 4); *United States* v. *Leahey*, 434 F.2d 7 (C.A. 1); *United States* v. *Sourapas*, 515 F.2d 295 (C.A. 9). *Contra: United States* v. *Leonard*, 524 F.2d 1076 (C.A. 2), certiorari denied, May 3, 1976 (No. 75-1016); *United States* v. *Gentile*, 525 F.2d 252 (C.A. 2). Cf. *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976.

3. Finally, petitioner contends (Pet. 22-23) that the evidence of his involvement in gambling and of his arrest for bribery of a police officer was highly prejudicial. But this evidence was probative of a likely source of taxable income and, hence, admissible. The trial judge carefully instructed the jury of the limited purpose for which this evidence was admitted, *i.e.*, to show a likely source of taxable income. See, *e.g.*, *United States* v. *Eliano*, 522 F.2d 201 (C.A. 2); *United States* v. *Vario*, 484 F.2d 1052 (C.A. 2), certiorari denied, 414 U.S. 1129; *United States* v. *Marquez*, 332 F.2d 162 (C.A. 2).

The bribery incident in question occurred less than two months after the close of 1971, the last taxable year at issue. At that time petitioner stated that he had been paying $125 per month for protection of his gambling business. In the light of the additional evidence that petitioner's wife made weekly bank deposits of $150-$200 during a period of 1971 in which he was supposedly unemployed and petitioner's inability to identify his employer for 1970 (Tr. 211), the jury could have concluded that the source of petitioner's cash expenditures during 1970 and 1971 was unreported income from gambling.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

GILBERT E. ANDREWS,
ROBERT E. LINDSAY,
Attorneys.

MAY 1976.